



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2005

Mr. David Pagan
Associate Director
The Texas Office of State-Federal Relations
122 C Street, N.W., Suite 200
Washington, D.C. 20001

OR2005-05844

Dear Mr. Pagan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 227493.

The Texas Office of State-Federal Relations (the "OSFR") received a request for (1) "all memos, emails, correspondence, and status reports received by [OSFR] from any of the lobbyists working for the Federalist Group, Piper Rudnick, or Cassidy & Associates since Jan. 1, 2003;" (2) "emails, memos, correspondence, telephone logs or appointment calendars involving meetings or communications with Jack Abramoff or Grover Norquist;" (3) "details about [the] bidding process in which the lobbyists were hired, particularly the recent hiring of Todd Boulanger of Cassidy & Associates;" and (4) "a list of other lobbyists who bid for that contract and communications about why the previous contract with Piper Rudnick was terminated." OSFR claims that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.¹ OSFR has not submitted information to responsive to request items 2 and 3. To the extent such information exists, we assume OSFR has released it. If not, OSFR must do so. *See* Gov't Code §§ 552.301, .302. We have considered the exceptions OSFR claims and reviewed the submitted information.

¹Although OSFR raises the attorney-client privilege in the context of section 552.101 of the Government Code, this privilege is more properly deemed to be an aspect of section 552.107(1). *See* Open Records Decision No. 676 (2002).

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. This exception applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). An interagency memorandum is excepted from disclosure under section 552.111 if the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. See Open Records Decision No. 561 at 9 (1990).

OSFR explains that it “develops policy advice, opinions, and recommendations in its role of advising the agency’s Advisory Policy Board [the “board”], made up of the Governor, Lt. Governor, and Speaker of the House of Representatives.” See Gov’t Code §§ 751.010 (board shall work with OSFR director and discuss federal activities and issues with state agency representatives), .011 (board shall review OSFR’s priorities and strategies and deliver to director any suggested modifications). OSFR argues that all of the submitted documents “contain advice, opinions, and recommendations by OSFR relating to policy and strategy concerning pending action at the federal level by the Administration or U.S. Congress” and “reveal ongoing intra-agency or interagency deliberations relating to federal matters still unresolved.” OSFR also states that the submitted documents include “federal policy and strategy discussions between agency staff and outside consultants” which “consist of advice and opinions that are confidential and excepted from disclosure under section 552.111.” After reviewing OSFR’s arguments and the information at issue, we have marked a representative sample of information in Exhibit B that consists of advice, opinions, and recommendations of OSFR staff and outside consultants concerning policy issues that OSFR may withhold under section 552.111 of the Government Code. OSFR must release the factual information from Exhibit B.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents

a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.² TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

OSFR explains that Exhibit C consists of communications between an attorney for a board member and OSFR staff regarding a legal matter.³ OSFR further explains that these communications were made in the furtherance of the attorney’s rendition of professional legal services to the board and OSFR. Additionally, OSFR states that these documents were not intended to be disclosed to third persons other than those to whom disclosure is made in

² Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

³ *See* Tex. R. Evid. 503(a)(2) (defining “representative of the client” as person having authority to obtain legal services or to act on legal advice on behalf of client, or person who for purpose of effectuating legal representation makes or receives a confidential communication while acting in scope of employment for client).

furtherance of the rendition of legal services. Based on OSFR's representations and our review of Exhibit C, we find that OSFR may withhold Exhibit C under section 552.107 of the Government Code.

In summary, OSFR may withhold Exhibit C under section 552.107(1). OSFR may withhold the sample of information we marked in Exhibit B under section 552.111 of the Government Code. OSFR must release the factual information from Exhibit B.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

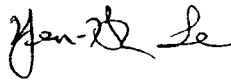
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Yen-Ha Le".

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 227493

Enc. Submitted documents

c: Mr. Bennett Roth
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(w/o enclosures)